

FILED

2008 FEB 25 PM 4:37

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY Rm DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SHAWN LIONEL LEWIS,

Petitioner,

v.

JOHN MARSHALL, Warden,

Respondent.

Civil No. 08-0267 W (WMc)

**ORDER DENYING IN FORMA
PAUPERIS APPLICATION AND
DISMISSING CASE WITHOUT
PREJUDICE AND WITH LEAVE
TO AMEND**

Petitioner, a state prisoner proceeding pro se, has not paid the \$5.00 filing fee and has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a).¹

REQUEST TO PROCEED IN FORMA PAUPERIS

The request to proceed in forma pauperis is denied because Petitioner has not provided the Court with sufficient information to determine Petitioner's financial status. A request to proceed in forma pauperis made by a state prisoner must include a certificate from the warden or other appropriate officer showing the amount of money or securities Petitioner has on account in the institution. Rule 3(a)(2), 28 U.S.C. foll.

¹ Petitioner filed a letter along with a pay stub from California Men's colony. This Court construed these liberally as a request to proceed in forma pauperis. *See Maleng v. Cook*, 490 U.S. 488, 493 (1989) (stating pro se submissions must be construed liberally).

1 § 2254; Local Rule 3.2. Petitioner has failed to provide the Court with the required
2 Prison Certificate.

3 **FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM**

4 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases,
5 Petitioner has failed to allege that his state court conviction or sentence violates the
6 Constitution of the United States.

7 Title 28, United States Code, § 2254(a), sets forth the following scope of review
8 for federal habeas corpus claims:

9 The Supreme Court, a Justice thereof, a circuit judge, or a
10 district court shall entertain an application for a writ of habeas
11 corpus in behalf of a person in custody pursuant to the
12 judgment of a State court only on the ground that he is in
13 custody in violation of the Constitution or laws or treaties of
14 the United States.

15 28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th
16 Cir. 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v.
17 Shimoda, 800 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal
18 habeas corpus claim under § 2254, a state prisoner must allege both that he is in custody
19 pursuant to a “judgment of a State court,” and that he is in custody in “violation of the
20 Constitution or laws or treaties of the United States.” See 28 U.S.C. § 2254(a).

21 Here, Petitioner claims in ground one that “the jury instructions silenced the jury,
22 any juror who inquired about priors [was] dismissed. . .” (Pet. at 3.) In ground two,
23 Petitioner states that “the commander and chief signed into law reducing terrorism for
24 those like me who have been denied injunctive relief.” (Pet. at 4.) In no way does
25 Petitioner claim he is “in custody in violation of the Constitution or laws or treaties of
26 the United States.” 28 U.S.C. § 2254.

27 Further, the Court notes that Petitioner cannot simply amend his Petition to state
28 a federal habeas claim and then refile the amended petition in this case. He must exhaust
state judicial remedies before bringing his claims via federal habeas. State prisoners who
wish to challenge their state court conviction must first exhaust state judicial remedies.
28 U.S.C. § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust

1 state judicial remedies, a California state prisoner must present the California Supreme
 2 Court with a fair opportunity to rule on the merits of every issue raised in his or her
 3 federal habeas petition. See 28 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34.
 4 Moreover, to properly exhaust state court judicial remedies a petitioner must allege, in
 5 state court, how one or more of his or her federal rights have been violated. The
 6 Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned: “If state courts are
 7 to be given the opportunity to correct alleged violations of prisoners’ federal rights, they
 8 must surely be alerted to the fact that the prisoners are asserting claims under the United
 9 States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas
 10 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the
 11 due process of law guaranteed by the Fourteenth Amendment, he must say so, not only
 12 in federal court, but in state court.” Id. (emphasis added).

13 Additionally, the Court cautions Petitioner that under the Antiterrorism and
 14 Effective Death Penalty Act of 1996 (Act), signed into law on April 24, 1996, a one-year
 15 period of limitation shall apply to a petition for a writ of habeas corpus by a person in
 16 custody pursuant to the judgment of a State court. The limitation period shall run from
 17 the latest of:

18 (A) the date on which the judgment became final by the
 19 conclusion of direct review or the expiration of the time for
 seeking such review;

20 (B) the date on which the impediment to filing an
 21 application created by State action in violation of the
 Constitution or laws of the United States is removed, if the
 22 applicant was prevented from filing by such State action;

23 (C) the date on which the constitutional right asserted
 24 was initially recognized by the Supreme Court, if the right has
 been newly recognized by the Supreme Court and made
 retroactively applicable to cases on collateral review; or

25 (D) the date on which the factual predicate of the claim
 26 or claims presented could have been discovered through the
 exercise of due diligence.

27 28 U.S.C. § 2244(d)(1)(A)-(D) (West Supp. 2002).
 28

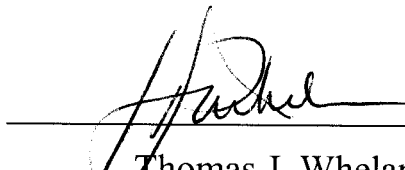
1 v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its
2 delivery and acceptance [by the appropriate court officer for placement into the record]
3 are in compliance with the applicable laws and rules governing filings.”). However,
4 absent some other basis for tolling, the statute of limitations does run while a federal
5 habeas petition is pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

6 CONCLUSION

7 Accordingly, the Court **DENIES** the request to proceed in forma pauperis, and
8 **DISMISSES** the case without prejudice for failure to satisfy the filing fee requirement
9 and failure to state a cognizable federal claim. To have the case reopened, Petitioner
10 must, **no later than April 15, 2008**, (1) pay the \$5.00 filing fee or provide adequate
11 proof of his inability to pay and (2) file a First Amended Petition addressing the pleading
12 deficiencies discussed above. *For Petitioner’s convenience, the Clerk of Court shall*
13 *attach to this Order a blank Southern District in forma pauperis form and a blank First*
14 *Amended Petition form.*

15 **IT IS SO ORDERED.**

16
17 DATED: 2/25/08

18 
19 _____
20 Thomas J. Whelan
21 United States District Judge
22
23
24
25
26
27
28